IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1645

J. MICHAEL DONAHOE, et al.,

Appellants,

vs.

BEECH AIRCRAFT CORPORATION,

Appellees.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A. OPINIONS BELOW

On February 6, 1974, judgment was entered by the Ninth Circuit Court of Appeals, affirming a United States District Court order, denying the appropriateness of this action as a class action under Federal Rules of Civil Procedure, Rule 23. A copy

of the District Court order is attached hereto as Appendix A. The Findings of Fact and Conclusions of Law entered in connection with the District Court order is attached hereto as Appendix B. The opinion of the Ninth Circuit Court of Appeals is attached hereto as Exhibit C.

On March 25, 1974, the Ninth Circuit Court of Appeals denied Petitioner's Application for Rehearing. A copy of the order is attached hereto as Appendix D.

B. JURISDICTION

Jurisdiction of this Court is invoked to review the Ninth Circuit Court of Appeal's order affirming the District Court's decision denying the suitability of this action for class action adjudication under Federal Rule 23, as well as the order of the Court of Appeals, denying Petitioner's Application for a Rehearing.

Jurisdiction of this Court to review by certiorari, the aforementioned orders is believed to be confirmed by 28 U.S.C. §1254 set forth in pertinent parts as follows:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...."

The date of entry of judgment by the Ninth Circuit Court of Appeals was February 6, 1974. The date of order denying rehearing was March 25, 1974.

C. QUESTION PRESENTED FOR REVIEW

The sole question for review is whether the lower court and in turn the Ninth Circuit of Appeals was at all times material herein, without subject matter jurisdiction in this removed matter, in that the action does not involve the requisite jurisdictional amount in controversy between the parties as required by 28 U.S.C. §1332(a) and 28 U.S.C. §1441(a).

D. REFERENCES

1. 28 U.S.C. §1332;

2. 28 U.S.C. §1441;

3. 28 U.S.C. §1447;

4. Rule 23, Federal Rules of Civil Procedure;

5. California Code of Civil Procedure, §382.

The full text of these statutes are set forth in Appendix E, attached hereto.

E. STATEMENT OF THE CASE

On June 7, 1971, a complaint was filed in the Superior Court for the County of Los Angeles, State of California, by Fletcher Jones, alleging that Beech Aircraft Corporation had for approximately ten years known of a defect existing in the fuel system of certain subject aircraft and had for the ten year period embarked upon a scheme to conceal the defect from the Federal Aviation Administration and the general public. The complaint was on behalf of Mr. Jones himself and "all others similarly situated", as owners of the designated

aircraft, alleged to contain the defect in the fuel system. The complaint alleged that by reason of alleged fraud and deceit attendant to Beech's marketing and sale of these aircraft, that each member of the class be awarded approximately eight hundred dollars ($800.00) for the cost of repair of the defect as well as punitive damages for the sum of one hundred million dollars ($100,000,000.00) for the class as a whole.

The complaint further alleged that there were approximately fifteen thousand members who made up the class. The total aggregated amount in controversy was alleged to be in the sum of one hundred twelve million dollars.

Before answering the state court action, Beech petitioned the United States District Court, Central District of California, for a removal order under 28 U.S.C. §1441, alleging in this petition that the matter involved a controversy between residents of different states, and that the amount in controversy exceeded ten thousand dollars. The Petition for Removal was granted and the cause was removed to the United States

District Court.

Prior to any decision as to the suitability of the case for class action purposes, Fletcher Jones was killed in an aircrash. This event required the substitution of the named plaintiffs, and petitioner herein, Donahoe and McLeod, and an amended complaint reflecting this change in parties was filed with the District Court.

Thereafter the matter was decided by the District Court to be inappropriate for class action purposes under Federal Rule 23, and an order to that effect was entered on March 13, 1973.

The District Court then certified the case to be suitable for an interlocutory appeal under 28 U.S.C. §2092(b). Petitioners then petitioned the Ninth Circuit Court of Appeals for permission to file an interlocutory appeal and the petition was granted on April 5, 1973.

On February 6, 1974 the Court of Appeals affirmed the lower court's ruling and on March 25, 1974 denied petitioners' Petition for Rehearing.

F. FEDERAL JURISDICTION

The basis for Federal Court jurisdiction was alleged to be pursuant to 28 U.S.C. §1332. This allegation was made by Beech in their Petition for Removal under 28 U.S.C. §1441. Petitioner's do not agree that there is a proper basis for Federal Court jurisdiction, and that the allegations contained in Beech's Petition for Removal were erroneous. This is the error that is sought to be reviewed by this petition.

G. ARGUMENT WHY CERTIORARI SHOULD BE GRANTED

Petitioners urge that this Court grant their petition for review of the proceedings below, for the reason that neither court had subject matter jurisdiction over this proceeding.

The requirements of presenting a Federal question under 28 U.S.C. §1332, in class action matters have been the subject of review by two recent decisions of this Court. The decisions of Snyder v. Harris, 394 U.S. 332 (1969) and Zahn v.

International Paper Co., ___ U.S. ___, 42 L.W. 4087 (1973), hold that the jurisdictional minimum of ten thousand dollars in diversity matters cannot be attained by the aggregation of all class member's claims, present or not present. Each class member must independently show that his claim meets the ten thousand dollar jurisdiction minimum. Where there is no showing that any claim meets the ten thousand dollar minimum, the cause must be dismissed or in a removed matter, the cause must be remanded to the state court where it originated. Givens v. W. T. Grant, 409 U.S. 56 (1972).

Petitioners submit that this action falls clearly within the guidelines as set forth above, and that by reason of the fact that none of the members who comprise this class, claim damages in excess of ten thousand dollars, the entire matter should be remanded to the state court. The Ninth Circuit's refusal to so order, petitioners submit, is in direct conflict with the decisions of this Court.

Petitioners first learned of the jurisdictional defects after the recent

decision of Zahn, supra, was published. Petitioners informed the Court of Appeals by way of Petition for Rehearing of their belief that this removed matter does not involve a federal question. Although the total claim for damages ($112,000,000.00) is large, so too is the class on whose behalf petitioners bring this action (15,000 potential member litigants). Although the complaint specifically alleges compensatory damages of $800 per litigant, the complaint only alleges the aggregate sum of $100,000,000.00 for the claim of punitive damages. If the aggregate punitive damage claim is broken down to represent each class member's individual claim, the figure obtained is only $6,666.00 per member. Add to this figure each member's compensatory damage claim of $800.00, and a figure of $7,466.00 is obtained, which represents each class member's total claim, against the defendant. A figure far below the $10,000 requirement in Federal class actions predicated upon diversity of citizenshipment, as announced in Zahn. Thus there is no federal jurisdiction in this matter and the proper procedure is to

remand the entire matter back to the State Court where it originated.

The lack of Federal jurisdiction runs to the core of any litigation in the Federal court system. Federal jurisdiction cannot be conferred by agreement of the parties nor can jurisdictional defects ever be waived. In fact this Court has stated that it is encumbent that any court, in any stage of the proceedings, decide the issue for itself. Mansfield, Coldwater and Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.ed. 462 (1884).

In Mansfield, supra, the Supreme Court on its own initiative raised the question of lack of Federal jurisdiction, in a removed action, on appeal on the merits of a judgment against the defendants. Justice Mathews speaking for the court had this to say at page 382 (111 U.S. 379, 382):

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed

should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception which requires this Court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

The prejudice to Petitioners of being bound by a decision of the courts lacking

in jurisdiction cannot be overstated. It must be remembered that Petitioners did not originally file in Federal Court, but were removed there on petition by the defendant, Beech. Once in federal court, petitioners were put to the burden of establishing the appropriateness of this class action under Federal Rules of Civil Procedure, Rule 23. At the same time petitioners were denied the benefit of the procedural rules of the State of California, with respect to class actions embodied in California Code of Civil Procedure §382 and as interpreted by decisions of that State.

Daar v. Yellow Cab, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967) established the following rule with regard to the suitability of class actions brought under CCP §382. The trial court must answer the following two questions in the affirmative: Is there an ascertainable class? Is there a well defined community of interest in the questions of law and fact involved? In the recent decision of Vasquez v. Superior Court, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964, the California Supreme Court ruled that a consumer class action based upon common law fraud

could be maintained under CCP §382, the requirements of Daar, had been satisfied.

Comparing this procedural test of California with that of Federal Rule 23, in particular Rule 23(b)(3), the differences become readily apparent. To be required to meet the muster of Rule 23 in a case properly in Federal court is one thing. To be subjected to its vigorous requirements when not properly in Federal Court is another matter altogether.

CONCLUSION

For the reason that the District Court and Appellate Court were at all times without jurisdiction because of the improper removal, the cause having not fulfilled the requirements of 28 U.S.C. §1332, petitioners urge this Court grant their petition.

Respectfully submitted,

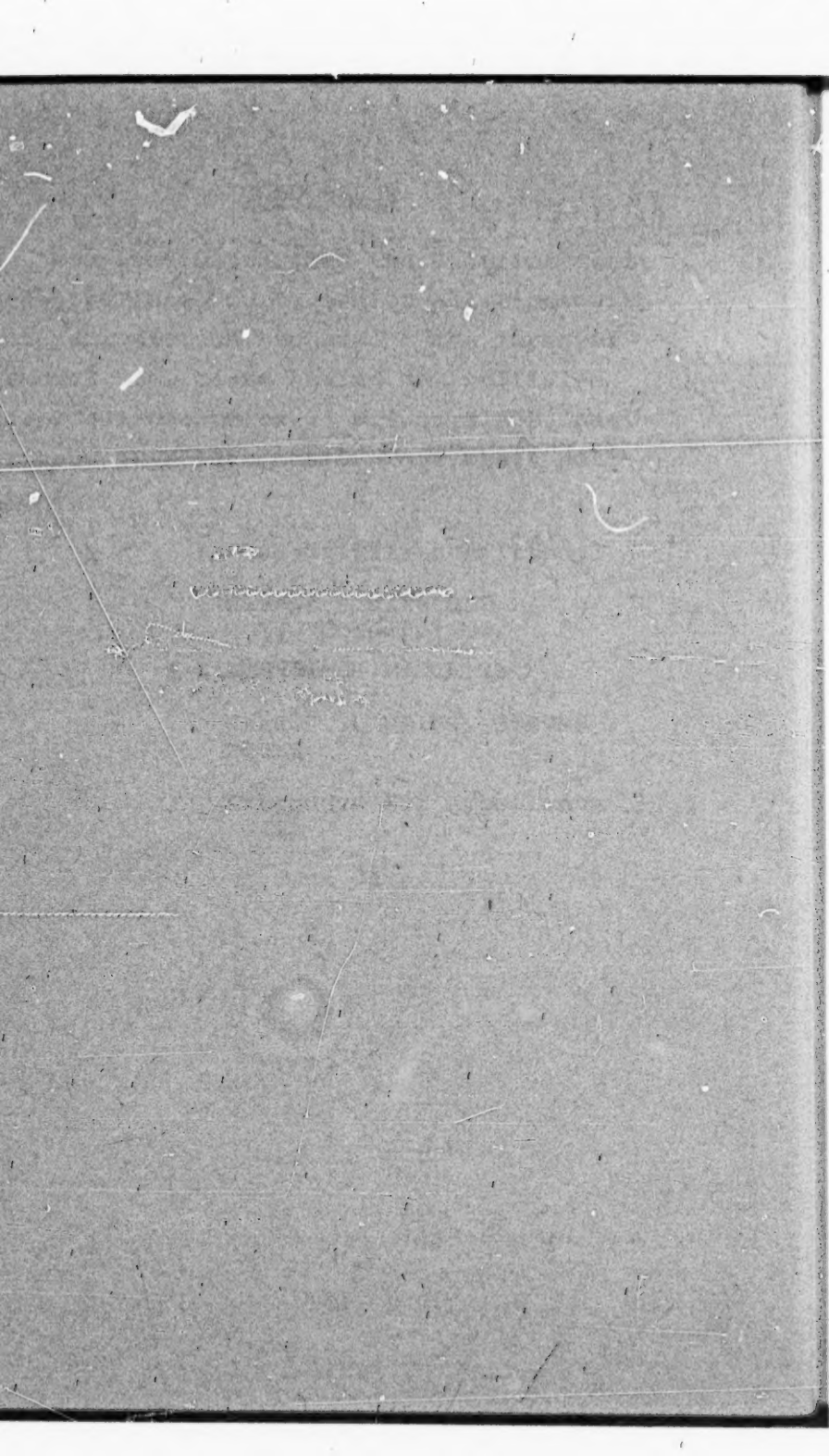
MAGANA & CATHCART
A Law Corporation

By: JAMES McCARTHY

WALKUP, DOWNING, STERNS & POORE

Attorneys for Appellants

APPENDIX A



APPENDIX A

Order Determining That Action May Not Be Maintained as a Class Action.

United States District Court, Central District of California.

Fletcher Jones, on behalf of himself and all others similarly situated, Plaintiff, v. Beech Aircraft Company, a corporation, and Does I to XX, inclusive, Defendants.

J. Michael Donahoe, *et al.*, Plaintiffs, v. Beech Aircraft Company, Defendant. No. 71-1558-MML.

Filed March 13, 1973.

On January 22, 1973, the motion of Beech Aircraft Corporation for an order pursuant to Rule 23(c)(1) declaring that the above-entitled action may not be maintained as class action came on for hearing. Sherman Welpton, Jr., and Robert Forgnone of Gibson, Dunn & Crutcher, and Robert Martin of Martin, Pringle, Schell & Fair appeared on behalf of defendant, Beech Aircraft Corporation. Daniel C. Cathcart of Magana & Cathcart appeared on behalf of plaintiffs.

The Court, having considered the briefs and evidence presented by the parties and heard argument of counsel thereon, has determined that this action is not appropriate for class adjudication under the criteria set forth in Rule 23, Federal Rules of Civil Procedure; that any questions of law and fact which may be common to the class do not predominate over questions affecting only individual members; that the action, if maintained as a class action, would be unmanageable; that a class action would not result in a fair and efficient adjudication of the controversy; and that a class

action would not result in economies of time, effort and expense.

Although there may be some issues common to the class, these issues are outweighed by the overwhelming number of individual issues which must be adjudicated as to each member of the alleged class; these individual issues affecting individual members will require substantial discovery and testimony from individual members of the class and would result in the trial of thousands of individual actions; accordingly, the claims or defenses of the representative parties are not typical of the claims or defenses of the class, a class action would not be superior to other available methods for the fair and efficient adjudication of the controversy, a class action would be unmanageable and would result in substantial prejudice to the rights of the parties herein.

THE COURT THEREFORE ORDERS, ADJUDGES AND DECREES, that defendant's Motion is granted and that this action may not be maintained as a class action.

IT IS FURTHER ORDERED, that plaintiff file an amended complaint deleting from his present complaint all allegations respecting the representation of absent parties.

DATED: March 13, 1973.

MALCOLM M. LUCAS
Judge
United States District Court
Central District of California

APPENDIX B

APPENDIX B

Findings of Fact and Conclusions of Law on Motion for Order Determining That Action May Not Be Maintained as a Class Action.

United States District Court, Central District of California.

Fletcher Jones, on behalf of himself and all others similarly situated, Plaintiff, v. Beech Aircraft Company, a corporation, and Does I to XX, inclusive, Defendants.

J. Michael Donahoe, Nelson J. MacLeod, on behalf of themselves and all others similarly situated, Plaintiffs, v. Beech Aircraft Company, Defendant. No. 71-1558-MML.

Filed March 13, 1973.

On January 22, 1973, the Motion of Beech Aircraft Corporation for an order pursuant to Rule 23 (c)(1) declaring that the above-entitled action may not be maintained as a class action came on for hearing.

The Court, having considered the brief and evidence presented by the parties and heard argument of counsel thereon, finds and concludes as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. This is a civil action filed by certain named Plaintiffs against Beech Aircraft Corporation, a Delaware corporation with its principal place of business located in the State of Kansas.

2. The original Complaint in this action was filed on June 24, 1971, in the Superior Court of the State

of California for the County of Orange. Subsequent thereto, the case was removed to this Court pursuant to 28 U.S.C. 1441 *et seq.*

3. The original Complaint in this action was filed by one Fletcher Jones, on behalf of himself and all others similarly situated. The original Complaint, as filed, alleged that Plaintiff Jones was a resident of the State of California.

4. Plaintiff Jones expired during the pendency of this action. Subsequent thereto, an amended Complaint was filed substituting in the place and stead of Plaintiff Jones, J. Michael Donahoe, an attorney and resident of the States of Oklahoma and Arizona, and Nelson J. MacLeod, an aircraft mechanic and resident of the State of Delaware.

5. The Plaintiffs in this action purport to represent all members of a class defined as all persons having owned certain designated aircraft manufactured by Defendant Beech Aircraft Corporation.

6. The Complaint alleges that certain designated models of aircraft manufactured by Defendant Beech Aircraft Corporation are defective in the design and construction of optional 40 gallon fuel systems. It is alleged that under certain circumstances of ground and flight operation, fuel in the system can move in a "spanwise" direction, uncovering the fuel outlet ports of the fuel cells and thereby allowing air to enter the fuel system causing a fuel starvation to the aircraft's engines and permitting engine stoppage.

7. The Complaint is framed in common-law theories of fraud and deceit. It is alleged that the Defendant certified the aircraft as "airworthy" and free from de-

fects with knowledge that "spanwise" displacement of fuel in the fuel system could occur. It is further alleged that the Defendant provided false and fraudulent information to the Federal Aviation Administration so as to obtain permission to manufacture the aircraft and to install thereon a "Certificate of Airworthiness".

8. The Complaint alleges that the named Plaintiffs and the members of the class relied solely on the "Certificate of Airworthiness" attached to the aircraft in purchasing and utilizing said aircraft.

9. Four separate aircraft models manufactured by Defendant Beech Aircraft Corporation are alleged to be defective. They are: (1) the Beechcraft Bonanza Aircraft, a single-engine, four-place metal aircraft, manufactured by Defendant Beech Aircraft Corporation continuously since 1946 and incorporating forty-gallon fuel cell systems as optional equipment since approximately 1960; (2) the Beechcraft Debonair Model Aircraft, a single-engine, four-place metal airplane, in continuous production since 1959 and incorporating as optional equipment forty-gallon fuel cell systems since 1961; (3) the Beechcraft Baron Aircraft, a twin-engine metal aircraft in continuous production since 1960 and incorporating as optional equipment forty-gallon fuel cell systems since 1960; (4) the Beech Travelair Model Aircraft, a twin-engine metal aircraft in continuous production from 1957 to 1968 and incorporating forty-gallon fuel cell systems as optional equipment from 1961 to 1968.

10. The Complaint alleges that Defendant has manufactured and sold approximately 9,000 Bonanza and Debonair aircraft. The Complaint further alleges that 6,000 Travelair and Baron aircraft have been manufactured and sold by Defendant.

11. Plaintiff Donahoe has owned two aircraft manufactured by Defendant Beech Aircraft Corporation and identified in the Complaint as being defective.

12. At the time of the filing of the Complaint, Plaintiff Donahoe was the owner of a Beechcraft Baron Model C-55, Serial No. TE-263, bearing FAA registration mark 4834J.

13. The Baron aircraft was purchased by Plaintiff Donahoe as a used aircraft. The chain of title of said aircraft, from its date of manufacture and first sale by Defendant Beech Aircraft Corporation, through the hearing of the motion herein is as follows:

Date	Seller	Purchaser	Residence of Seller	Residence of Purchaser
5/66	Beech Aircraft Corporation	Hartzog-Schneck Supply Inc.	Kansas	Illinois
5/67	Hartzog-Schneck	Calumet Aviation	Illinois	Indiana
6/67	Calumet-Aviation	Alloy Ring Service Inc.	Indiana	Ohio
1/70	Alloy Ring Service Inc.	Page Airways Inc.	Ohio	New York
1/70	Page Airways Inc.	Aero Auction Inc.	New York	Oklahoma
2/70	Aero Auction Inc.	J. Michael Donahoe	Oklahoma	Arizona
6/72	J. Michael Donahoe	Craig Heath	Arizona	Texas

14. Prior to the filing of the Complaint, Plaintiff Donahoe was the onwer of a Beech aircraft identified in the Complaint as being defective. Said aircraft was purchased by Plaintiff as a "used" aircraft and disposed of by plaintiff prior to the filing of the Complaint. This aircraft is a Model S-35 Beechcraft Bonanza, Serial No. D-7467, bearing FAA registration mark N 912 MD. The chain of title of said aircraft, from the date of manufacture and first sale by Defend-

ant Beech Aircraft Corporation through the hearing of the motion herein, is as follows:

Date	Seller	Purchaser	Residence of Seller	Residence of Purchaser
6/64	Beech Aircraft Corporation	Tex-Sun	Kansas	Texas
6/64	Tex-Sun	John P. Threadgill	Texas	Texas
6/68	John P. Threadgill	Jack Adams Aircraft Co. Sales Inc.	Texas	Miss.
6/68	Jack Adams Aircraft Co. Sales Inc.	Currey-Sanders Aircraft Co.	Miss.	La.
6/68	Currey-Sanders Aircraft Co.	J. Michael Donahoe	La.	Arizona
5/69	J. Michael Donahoe	Craig Heath	Arizona	Texas
11/72	Craig Heath	Bert Lisle	Texas	Texas
11/72	Bert Lisle	R. T. Ziembinski	Texas	Texas
1/73	R. T. Ziembinski	A. L. Pickens Co.	Texas	Kentucky

15. At the time of the filing of the Complaint, Plaintiff MacLeod was the owner of a Beech Model B-55 Baron aircraft, Serial No. TC-1059, bearing FAA registration mark N7130N. The aircraft was purchased by Plaintiff MacLeod as a "used" aircraft and the chain of title of said aircraft is as follows:

Date	Seller	Purchaser	Residence of Seller	Residence of Purchaser
1/68	Beech Aircraft Corporation	Atlantic Aircraft Sales Corp.	Kansas	Delaware
1/68	Atlantic Aircraft Sales Corp.	Air Kaman Inc.	Delaware	Connecticut
3/68	Air Kaman Inc.	Baldwin Enterprises, Inc.	Connecticut	Connecticut
6/68	Baldwin Enterprises, Inc.	Air Kaman Inc.	Connecticut	Connecticut
8/68	Air Kaman Inc.	Nelson J. MacLeod	Connecticut	Maryland

16. On the basis of the foregoing evidence, the Court finds that many of the aircraft identified as belonging to unnamed members of the class have been sold and resold on numerous occasions, that some of said aircraft were purchased as "used" aircraft by parties owning said aircraft on the date the Complaint was filed, and that some of the persons owning said aircraft on the date of the filing of the Complaint purchased said aircraft as a "new" aircraft.

17. Beech Aircraft Corporation denies all of the material allegations of the Complaint.

18. Since 1961, notices making reference to the operation, under certain conditions, of the forty-gallon fuel cell system installed in said aircraft have been sent by Defendant to various categories of persons owning, maintaining, or otherwise dealing with the aircraft which are the subject of the Complaint.

19. The Federal Aviation Administration has issued documents entitled Airworthiness Directives addressed to the registered owners of the aircraft identified in the Complaint, which Directives have as their subject matter the operation of the forty-gallon fuel cell system installed in said aircraft.

20. Notices from Beech Aircraft Corporation and/or the Federal Aviation Administration having as their subject matter the operation of the forty-gallon fuel cell system were issued by Beech or the Federal Aviation Administration on the following dates:

Date	Agency	Document	Aircraft Affected
4/65	Defendant	Service Letter	Bonanza
9/65	Defendant	Owners Manual	Bonanza
6/68	Defendant	Flight Manual	Baron
8/68	Defendant	Flight Manual	Baron
8/68	Defendant	Service Instruction	Baron
12/68	Defendant	Flight Manual	Baron
1/69	FAA	Airworthiness Directive	Baron
1/69	FAA	Airworthiness Directive	Baron
8/69	Defendant	Service Instruction	Bonanza
1/70	FAA	Airworthiness Directive	Bonanza
2/70	FAA	Airworthiness Directive	Bonanza
7/70	FAA	Airworthiness Directive	Baron
8/70	Defendant	Flight Manual	Baron
1/71	Defendant	Flight Manual	Baron
5/71	Defendant	Flight Manual	Baron
10/71	Defendant	Service Instruction	Baron
2/72	Defendant	Service Instruction	Bonanza
5/72	FAA	Airworthiness Directive	Bonanza
5/72	Defendant	Letter	Bonanza
5/72	FAA	Airworthiness Directive	Baron
5/72	Defendant	Letter	Baron
6/72	FAA	Airworthiness Directive	Baron
1/73	Defendant	Letter	Baron

The aforementioned notices are those affecting the aircraft models owned by the named Plaintiffs. Additional notices have been issued respecting other aircraft.

21. Individual issues exist with reference to each of the individual owners of Beech aircraft purported to be represented herein as to their information and knowl-

edge concerning the forty-gallon fuel cell system installed in their aircraft and the operation of said system under various conditions.

22. The transactions by which the named Plaintiffs, MacLeod and Donahoe, acquired their aircraft occurred outside the State of California and many of the transactions by which the unnamed owners, purported to be represented herein, acquired their aircraft occurred outside the State of California.

23. It will be necessary to determine as to each of the aforesaid transactions what state's law applies.

24. The class is so numerous and questions of law or fact so diverse that joinder of all members in a class action, or otherwise, is impracticable.

25. The claims or defenses of the representative parties are not typical of the claims or defenses of the class.

26. The prosecution of separate actions by or against individual members of the class would not create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; nor would the prosecution of separate actions by or against individual members of the class create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication, or substantially impair or impede their ability to protect their interest.

27. Neither injunctive relief nor declaratory relief is requested in this action.

28. Common questions of law or fact, if any, do not predominate over questions affecting any individual members of the class.

29. Class adjudication of this controversy would not be superior to other available methods for the fair and efficient adjudication of the controversy.

30. There is no desirability of concentrating the litigation of these claims in this particular forum.

31. This action if maintained as a class action would be unmanageable.

32. This action if maintained as a class action would not result in a fair and efficient adjudication of the controversy.

33. This action if maintained as a class action would not result in economies of time, effort and expense.

34. This action is not appropriate for class adjudication under the criteria set forth in Rule 23 of the Federal Rules of Civil Procedure.

Conclusions of Law

1. In all respects as set forth in the foregoing Findings of Fact, which are hereby incorporated by reference.

2. Individual issues exist with reference to each of the individual owners of Beech aircraft purported to be represented herein as to their information and knowledge concerning the forty-gallon fuel cell system installed in their aircraft and the operation of said system under various conditions.

3. The transactions by which the named Plaintiffs, MacLeod and Donahoe, acquired their aircraft occurred outside the State of California and many of the trans-

actions by which the unnamed owners, purported to be represented herein, acquired their aircraft occurred outside the State of California.

4. It will be necessary to determine as to each of the aforesaid transactions what state's law applies.

5. The class is so numerous and questions of law or fact so diverse that joinder of all members in a class action, or otherwise, is impracticable.

6. The claims or defenses of the representative parties are not typical of the claims or defenses of the class.

7. The prosecution of separate actions by or against individual members of the class would not create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; nor would the prosecution of separate actions by or against individual members of the class create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication, or substantially impair or impede their ability to protect their interest.

8. Neither injunctive relief nor declaratory relief is requested in this action.

9. Common questions of law or fact, if any, do not predominate over questions affecting any individual members of the class.

10. Class adjudication of this controversy is not superior to other available methods for the fair and efficient adjudication of the controversy.

11. There is no desirability of concentrating the litigation of these claims in this particular forum.

12. This action if maintained as a class action would be unmanageable.

13. This action if maintained as a class action would not result in a fair and efficient adjudication of the controversy.

14. This action if maintained as a class action would not result in economies of time, effort and expense.

15. This action is not appropriate for class adjudication under the criteria set forth in Rule 23 of the Federal Rules of Civil Procedure.

DATED: March 13, 1973.

/s/ Malcolm M. Lucas
Judge
United States District Court

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. COURT OF APPEALS

J. Michael Donahoe, et al.,

Plaintiffs-Appellants,

vs.

BEECH AIRCRAFT COMPANY,

Defendants-Appellees.

No. 73-1605

Appeal from the United States District Court for the Central District of California

Before: MERRILL and ELY, Circuit Judges, and ZIRPOLI, District Judge*

MEMORANDUM

Appellants and plaintiffs, J. Michael Donahoe and Nelson J. MacLeod, bring this interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), from the March 13, 1973, order of the district court that the action could not proceed as a class action and striking the class action allegations from the complaint. Plaintiffs' petition for leave to file an interlocutory appeal was granted April 5, 1973.

The complaint in this action was originally filed June 7, 1971, in California state court by Fletcher Jones, a California resident, on behalf of himself and all other purchasers and/or owners of Beech Bonanza, Debonair, Travel Air, or Baron aircraft with forty gallon fuel cells. Appellee and defendant, Beech Aircraft Corporation, is a Delaware corporation engaged in the manufacture of private, military, and

* Honorable Alfonso J. Zirpoli, United States District Judge, Northern District of California, sitting by designation.

commercial aircraft with its principal place of business in Wichita, Kansas. The action was removed to federal court pursuant to 28 U.S.C. § 1441.

Following Jones' death an amended complaint was filed January 5, 1973, substituting Donahoe, an attorney and resident of Oklahoma and Arizona, and MacLeod, an aircraft mechanic and resident of Delaware, as plaintiffs. The class action allegations were amended to include all similarly situated owners of the four aircraft at the time of the filing of the initial complaint.

According to the complaint, the four aircraft models manufactured by Beech contained optional forty gallon fuel cells which were defective in design and construction, in that under certain circumstances of ground and flight operation, fuel in the cell can move in a "spanwise" direction, uncovering the fuel outlet ports of the cells and allowing air to enter the fuel system causing fuel starvation and consequent engine stoppage.

The complaint seeks compensatory damages for the cost of replacing the defective cells and punitive damages based on the common law theories of fraud and deceit. It is plaintiffs' contention that Beech certified the aircraft as "airworthy" and free from defects knowing that the "spanwise" fuel displacement could occur. They further contend that Beech provided false and fraudulent information to the Federal Aviation Administration to obtain permission to manufacture the aircraft and install in each aircraft a "Certificate of Airworthiness." Finally, they claim that the class members relied upon the airworthiness certificate in purchasing and using the aircraft, and that Beech has concealed the existence of the defects from the class members.

Rule 23(c)(1) of the Federal Rules of Civil Procedure

FYI-Readiness
2-19-73-10M-GHB

read in conjunction with the broad powers given the trial court in Rule 23(d) to fashion appropriate orders for the conduct of class actions indicate that the district court has the primary responsibility for determining the limits and course of actions brought under the rule. The need for restraint in reviewing orders of the district court due to the special knowledge that the trial court has concerning the practical and realistic problems presented by class actions is especially obvious here.

The district court issued its order some 21 months after the action was originally filed. Considerable discovery had taken place. In reaching its conclusion, the district court had the entire record of the proceedings before it and had to consider almost 300 pages of points and authorities and supporting affidavits.

Given these considerations, we are in agreement with the second circuit that where the trial court has made its determination of the class action issue, "the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if . . .he has canvassed the factual aspects of the litigation." City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

Therefore, when the court's findings and conclusions indicate that the appropriate criteria were applied to the facts of the case, its decision on the question of certification of the class action will not be disturbed on appeal unless the challenging party demonstrates that the court abused its discretion. Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 792-93(10th Cir. 1970). See also Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir. 1972); City of New York v. International Pipe & Ceramics Corp., supra.

The findings of fact and conclusions of law filed along with the district court's March 13, 1973, order demonstrate that the trial court did apply the correct criteria, and the finding that a class action may not be maintained was not an abuse of discretion.

In order to maintain a class action, all of the requirements of Rule 23(a) must be met, and in addition, the class action must come under one of the subdivisions of Rule 23(b), in this case section (b)(3). The burden is on the proponent of the class action, appellants here, to demonstrate that the separate requirements of Rule 23(a) and (b)(3) have been met. 3B Moore's Federal Practice ¶ 23.02, at 23-152 to 23-153 (2d ed. 1969); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

The trial court found that neither subsection (a)(3) nor subsection (b)(3) of Rule 23 was satisfied. Specifically, the court determined that the claims of the representative parties were not typical of the claims of the class; that common quesitons of law or fact did not predominate over questions affecting any individual members of the class; and that class adjudication of this controversy would not be superior to other available methods for the fair and efficient adjudication of the controversy.

Each of these findings is based upon the trial court's conclusion that numerous transactions involving the individual aircraft that are the subject of the complaint will each involve separate determinations of the applicable state law, and that for each class member there are separate questions of their knowledge and information concerning the fuel system.

Based upon the specific findings of fact and conclusions of law of the court below, which we find to be amply supported by relevant data in the record made before the trial court,

we cannot say that these findings or any one of them are clearly erroneous, and based upon the criteria employed by the court below in appraising the propriety of entertaining the action as a class action, we cannot say that the court abused its discretion in any way. Accordingly, the order appealed from is affirmed.

FYI-Pendleton
3-19-71-1514-2366

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. MICHAEL DONAHOE, et al.,
Plaintiffs-Appellants,
vs.
BEECH AIRCRAFT COMPANY,
Defendants-Appellees.

No. 73-1605

ORDER

Before: MERRILL and ELY, Circuit Judges, and ZIRPOLI, District Judge

The petition for rehearing is denied.

FILED
MAR 25 1974
CLERK
U. S. COURT OF APPEALS

APPENDIX E

1. 28 U.S.C. §1332
2. 28 U.S.C. §1441
3. 28 U.S.C. §1447
4. Federal Rule of Civil Procedure 23
5. California Code of Civil Procedure §382

APPENDIX E

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal

place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.

Historical and Revision Notes

Reviser's Note. Based on Title 28, U.S.C., 1940 ed., § 41(1) (March 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091 [derived from R.S. §§ 563, 629; Mar. 3, 1875, c. 137, § 1, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1, 24 Stat. 552; Aug. 13, 1888, c. 866, § 1, 25 Stat. 433]; May 14, 1934, c. 283, § 1, 48 Stat. 775; Aug. 21, 1937, c. 726, § 1, 50 Stat. 738; Apr. 20, 1940, c. 117, 54 Stat. 143).

Other provisions of said section 41(1) of Title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1341, 1342, 1345, 1354, and 1359 of this title. (See reviser's notes under said sections.)

Jurisdiction conferred by other sections of this chapter, except section 1335, is not dependent upon diversity of citizenship. (See annotations under former section 41 of Title 28, U.S.C.A. [now constituting this chapter and sections 1397, 1399, 2361, 2401 and 2402 of this title], and 35 C.J.S., p. 833 et seq., §§ 30-43. See, also, reviser's note under section 1331 of this title.) As to citizenship of bank where jurisdiction depends upon diversity of citizenship, see section 1348 of this title.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" in order to conform to Rule 2 of the Federal Rules of Civil Procedure.

Words "or citizens of the District of Columbia, Territory of Hawaii, or Alaska, and any State or Territory" which were inserted by the amendatory Act April 20, 1940, are omitted. The word "States" is defined in this section and enumeration of the references is unnecessary.

The revised section conforms with the views of Philip F. Herrick, United States Attorney, Puerto Rico, who observed that the Act of April 20, 1940, permitted action between a citizen of Hawaii and of Puerto Rico, but not between a citizen of New York and Puerto Rico, in the district court.

This changes the law to insure uniformity. The 1940 amendment applied only to the provision as to controversies between "citizens of different States." The new definition in subsection (b) extends the 1940 amendment to apply to controversies between citizens of the Territories or the District of Columbia, and foreign states or citizens or subjects thereof.

The diversity of citizenship language of said section 41(1) of Title 28, U.S.C., 1940 ed., as amended in 1940, was described as ambiguous in McGarry v. City of Bethlehem, 45 F.Supp. 385, 386. In that case the 1940 amendment was held unconstitutional insofar as it affected the District of Columbia. However, two other district courts upheld the amendment. Winkler v. Daniels, D.C.Va.1942, 43 F.Supp. 265; Glaeser v. Acacia Mutual Life Ass'n, D.C. Cal.1944, 55 F.Supp. 925.

This section is intended to cover all diversity of citizenship instances in civil actions in accordance with the judicial construction of the language in the original section 41(1) of Title 28, U.S.C., 1940 ed. Therefore the revised language covers civil actions between—

Citizens of a State, and citizens of other States and foreign states or citizens or subjects thereof;

Citizens of a Territory or the District of Columbia, and foreign states or citizens or subjects thereof;

Citizens of different States;

Citizens of different Territories;

Citizens of a State, and citizens of Territories;

Citizens of a State or Territory, and

Citizens of the District of Columbia;

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

June 25, 1948, c. 646, 62 Stat. 937.

Historical and Revision Notes

Reviser's Note. Based on Title 28, U.S.C., 1940 ed. §§ 71, 114 (Mar. 3, 1911, c. 231, §§ 28, 33, 36 Stat. 1091, 1101; Jan. 20, 1914, c. 11, 38 Stat. 278; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54).

Section consolidates removal provisions of sections 71 and 114 of Title 28, U.S.C., 1940 ed., and is intended to resolve ambiguities and conflicts of decisions.

Phrases such as "in suits of a civil nature, at law or in equity," the words "case," "cause," "suit," and the like have been omitted and the words "civil action" substituted in harmony with rules 2 and 81(c) of the Federal Rules of Civil Procedure.

Ambiguous phrases such as "the District Court of the United States for the proper district" have been clarified by the substitution of the phrase "the district and division embracing the place where such action is pending." (See General Investment Co. v. Lake Shore & M. S. Ry. Co., 1922, 43 S.Ct. 107, 112, 260 U.S. 261, 67 L.Ed. 244 and cases cited therein.)

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.

Subsection (c) has been substituted for the provision in section 71 of Title 28, U.S.C., 1940 ed., "and when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States."

This quoted language has occasioned much confusion. The courts have attempted to distinguish between separate and separable controversies, a distinction which is sound in theory but illusory in substance. (See 41 Harv.L.Rev. 1048; 35 Ill.L.Rev. 576.)

Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause

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that action of federal court in Texas was based on defendant's contention; Civ. Code, La. art. 2291, being inapplicable. McLaughlin v. Western Union Telegraph Co., D.C.La.1925, 7 F.2d 177.

Opposing the appointment of a receiver does not waive the right to remove. Sidway v. Missouri Land, etc., Co., C.C.Mo. 1902, 116 F. 381.

Willingness to remain in state court for one cause of action does not show a willingness, or constitute a waiver, as to some different cause. Adams v. Western Steel Buildings, Inc., D.C.Colo.1969, 296 F.Supp. 750.

Defendant by filing its plea in abatement and its cross-action in Georgia court, which was not compulsory under Georgia law, waived defendant's right to remove the case to the federal court. Briggs v. Miami Window Corp., D.C.Ga. 1956, 158 F.Supp. 229.

Where action was commenced against two resident corporations and nonresident corporation, and action was dismissed as to two resident corporations, and attorney for nonresident corporation did not request removal of case at that time but waited until conclusion of plaintiff's opening statement before requesting removal, there was waiver of right of removal to federal court. Waldron v. Skelly Oil Co., D.C.Mo.1951, 101 F.Supp. 425.

Right to removal of condemnation proceeding to federal court after appeal to superior court was not waived by nonresident, by filing of exceptions to report of jury appointed by board of aldermen to assess damages; proceeding before appeal being administrative, and not "suit of civil nature." Town of Waynesville v. Smather, 1927, 138 S.E. 613, 194 N.C. 131.

The making and participating in the hearing of a motion to discharge a receiver does not amount to a waiver of the right to remove. Franklin v. Wolf, 1887, 3 S.E. 696, 78 Ga. 446.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 139, § 84, 63 Stat. 102; July 2, 1964, Pub.L. 88–352, Title IX, § 901, 78 Stat. 266.

Historical and Revision Notes

Reviser's Note. Based on Title 28 U.S.C. 1940 ed., §§ 71, 72, 74, 76, 80, 81 and 83 (Mar. 3, 1911, c. 231, §§ 28, 29, 31, 33, 37 and 38, 36 Stat. 1094–1098 [§ 71 derived from R.S. § 639; Acts Mar. 3, 1875, c. 137, § 2, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1,

Rule 23. Class Actions.

(a) PREREQUISITES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members

of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of ac-

tions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

History of Rule

[1]—General History.

Rule 23 stood as promulgated in 1937 until 1966 when it was completely revised. As a part of this revision the substance of original subdivision (b), *infra*, which dealt with the shareholder's derivative suit, was carried forward as Rule 23.1, *infra;* and provisions for class actions by or against representatives of an unincorporated association, which had been treated as true class actions, see ¶23.08, App., were carried forward as Rule 23.2, *infra*. ¶23.2.02.

Original Rule 23 was applicable to all civil actions whether formerly at "law" or in "equity". ¶23.02. And with the unification in 1966 of the civil and admiralty procedures, see Rule 1, *supra*, revised Rule 23 is applicable whether the claim or claims are legal, equitable, maritime, or a combination thereof. ¶23.02[2].

§ 382. Nonconsent to joinder as plaintiff; representative actions

If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

(Enacted 1872. Amended by Stats.1971, c. 244, p. 375, § 12, operative July 1, 1972.)

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